UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA

JOHN CHMIELEWSKI, Plaintiff, v. TMS INTERNATIONAL, LLC, Defendant.	)))))))))	CIVIL ACTION NO.: 3:16-cv-00421-JVB-JEM

MOTION TO STRIKE PLAINTIFF'S RESPONSE TO DEFENDANT'S REPLY IN SUPPORT OF ITS MOTION TO DISMISS, OR IN THE ALTERNATIVE, TO GRANT DEFENDANT AN OPPORTUNITY TO RESPOND

Pursuant to N.D. Ind. L.R. 7-1, Defendant, TMS International, LLC ("TMS"), by counsel, respectfully moves the Court to strike Plaintiff John Chmielewski's ("Plaintiff") "Response to Defendant's Reply in Support of its Motion to Dismiss Claimant's Complaint Pursuant to Rules 8, 10, 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure" [Dkt.21]. In support of this Motion, TMS states:

1. On July 29, 2016, TMS filed its Motion to Dismiss Plaintiff's Complaint for lack of subject matter jurisdiction and for nonconformity with Federal Rules of Civil Procedure 8 and 10.

2. In response to the motion, Plaintiff filed two responses, a "Primary Response to Defendant's Brief in Support of its Motion to Dismiss Plaintiff's Complaint" [Dkt. 15], and a "Secondary Response to Defendant's Brief in Support of its Motion to Dismiss Plaintiff's Complaint Pursuant to Rules 8, 10, 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure" [Dkt. 16].

3. Plaintiff's "primary response" consisted of 22 pages and his "secondary response" consisted of 7 pages, which eclipses the 25-page limit set forth in the Northern District of Indiana Local Rule 7-1(e)(1).

4. On September 30, 2016, Defendant filed a 13-page Reply in Support of its Motion to Dismiss. [Dkt. 18].

5. Even though N.D. Ind. L.R. 7-1(d) allows Plaintiff only one response to a Motion to Dismiss, on October 17, 2016, Plaintiff proceeded to file a 17-page "Response to Defendant's Reply in Support of its Motion to Dismiss Claimant's Complaint Pursuant to Rules 8, 10, 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure" [Dkt. 21].

6. Plaintiff did not seek permission of this Court to file a sur-reply. Moreover, his sur-reply is improper because it does not serve to address any new developments in the law, and there were no new issues addressed in Defendant's reply brief that he had not already had the opportunity to address in his earlier response brief(s). *See, e.g., Savage v. Finney*, 2011 U.S. Dist. LEXIS 99325, * 3-4 (N.D. Ind., Sept. 2, 2011) (Rodovich, M.J.) (striking Plaintiff's sur-reply, finding it to be unauthorized and "unnecessary"; "The rules do not contemplate the filing of a sur-reply brief, and [Plaintiff] was not entitled to file a sur-reply without seeking leave of Court . . . . [Plaintiff's] sur-reply does not address new developments in the law nor does it respond to arguments that could not have been addressed in his initial response.")

7. *Pro se* litigants are bound by the same procedural rules as practicing attorneys. *Freeland v. Kulak, 2013* U.S. Dist. LEXIS 161986, *8 (N.D. Ind. Nov. 13, 2013) ("*pro se* litigants are not excused from following procedural rules simply because the 'rules of procedure are based on the assumption that litigation is normally conducted by lawyers.'") (*citing Lee v. Wal-Mart Stores*, 1994 U.S. Dist. LEXIS 20916 (N.D. Ind. Apr. 12, 1994)). "[The court] ha[s]

never suggested that procedural rules in ordinary civil litigation should be interpreted so as to excuse mistakes by those who proceed without counsel." *Lee*, 1994 U.S. Dist. LEXIS 20916 at *1 (internal citations omitted).

8. N.D. Ind. L.R. 7-1 does not authorize a sur-reply as a matter of right by any party (regardless of whether he/she is *pro* se). *Moreno-Avalos v. City Hall of Hammond, Indiana, et al.*, 2014 U.S. Dist. LEXIS 21348, *4 (N.D. Ind. Feb. 20, 2014) (granting motion to strike sur-reply when *pro se* Plaintiff did not seek leave to file it; finding such sur-reply to be "a violation of N.D. Ind. L.R. 7.1, which only allows the moving party to file a reply brief.").

WHEREFORE, TMS respectfully moves the Court to strike Plaintiff's "Response to Defendant's Reply in Support of its Motion to Dismiss Claimant's Complaint Pursuant to Rules 8, 10, 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure." TMS further requests all other just and proper relief.

Should the Court deny this motion and accept Plaintiff's "Response" as filed, TMS respectfully requests that the Court grant TMS ten (10) days from the Court's order on this motion to file a substantive response.

Respectfully submitted,

s/David J. Pryzbylski

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CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of October, 2016, a copy of the foregoing was filed electronically. A copy of same was served on the following *pro se* Plaintiff by depositing same in the United States mail, first class, postage prepaid:

John Chmielewski
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s/David J. Pryzbylski
David J. Pryzbylski

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